is unreported. The amended judgment of the District Court is found in the Record at page 586, is printed in Appendix C (p. 29), and is unreported. The opinion of the Court of Appeals is found in the Record at page 596, is printed in Appendix D (p. 33), and is reported at 353 F. 2d 660.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 11, 1965, (R. 610), and is printed in Appendix E (p. 45). Rehearing was denied on February 1, 1966, (R. 635), Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. WHETHER IN A LONGSHOREMAN'S PERSONAL INJURY SUIT AGAINST A SHIPOWNER, A STEVEDORE CAN NEGLIGENTLY CAUSE OR BRING INTO PLAY AN UNSEAWORTHY CONDITION OF A VESSEL WITHOUT BREACHING ITS WARRANTY OF WORKMANLIKE SERVICE TO THE SHIPOWNER.

2. WHETHER A SHIPOWNER IS UNDER A DUTY TO USE REASONABLE CARE TO SUPPLY SOUND AND ADEQUATE SHIP'S GEAR TO A STEVEDORE FOR USE BY LONGSHOREMEN ABOARD THE VESSEL; AND IF SO, WHETHER A BREACH OF THAT DUTY WILL PRECLUDE INDEMNITY FROM THE STEVEDORE WHOSE NELIGENCE CAUSES OR BRINGS INTO PLAY THE UNSEAWORTHINESS RESULTING FROM THE DEFECTIVE GEAR.

STATUTES INVOLVED

There are no statutes directly involved in this petition. The Longshoremen's & Harbor Workers' Act[1] is collaterally involved.

STATEMENT OF THE CASE

The basis of federal jurisdiction in the Court of first instance, the United States District Court for the Eastern District of Louisiana, is because of diversity of citizenship, the plaintiff being a citizen of Louisiana and the defendant a corporation domiciled in Alabama.

On December 7, 1960, Francis David (hereinafter referred to as David) sustained serious personal injuries aboard Waterman Steamship Corporation's (hereinafter referred to as Waterman) SS ARIZPA, which was moored at New Orleans. At the time of his accident David was aboard the vessel as a longshoreman in the employ of Atlantic & Gulf Stevedores, Inc. (hereinafter referred to as Atlantic), which had been hired to act as stevedore for the SS ARIZPA.

David filed a Complaint in the United States District Court for the Eastern District of Louisiana against Waterman for $200,000.00 (R. 1); Atlantic not being sued because of the exclusive remedy afforded by the Longshoremen's & Harbor Workers' Act.[2] Waterman filed its Answer to the Complaint denying all liability for David's injuries (R. 8), and at the same time filed a Third Party Complaint against Atlantic alleging that any injuries sustained by David were caused by the negligence, fault, and breach of warranty, of Atlantic, for which Waterman was entitled to indemnity for any sums it might be ordered to pay David (R. 4). Atlantic filed Answer to the Third

[1] 44 Stat. 1424 (1927), 33 U.S.C. §§ 901 et seq.
[2] *Supra*, footnote 1.

Party Complaint, denied the truth of the allegations contained therein, and asserted a cross-claim against Waterman for the amount of workmen's compensation it had paid David (R. 10). Atlantic filed a cross-claim against David alleging that if it was found negligent, that same was attributable to it solely through David's negligence, and that it was entitled to recover from David any sums it might be required to pay Waterman (R. 12). Atlantic also amended its cross-claim against Waterman alleging that if the SS ARIZPA was unseaworthy, and if that unseaworthiness was a proximate cause of David's injuries, then Waterman had breached duties and warranties running in its favor, and consequently that it was entitled to damages measured by its workmen's compensation payments and any other sums which might be recovered against it by virtue of Waterman's Third Party Complaint (R. 28). Waterman filed Answer, denying all allegations (R. 30).

The case was tried before a jury and was submitted on special interrogatories and a general verdict (R. 551, 552), the contents of which were vigorously objected to by Waterman's counsel (R. 459, 567, 568). Thereafter, judgment was entered by the Trial Judge "upon the jury's special verdict" in favor of David and against Waterman in the amount of $84,000.00 with interest from the date of judicial demand and for all costs; and in favor of Atlantic, dismissing Waterman's Third Party Complaint (R. 557, 558).

Among other motions, Waterman moved the District Court to amend the judgment as to David to eliminate the award of pre-judgment interest (R. 558). This motion was granted, and the judgment was modified so as to render judgment for the amount of the verdict only (R. 586).

Waterman filed its Notice of Appeal from the Judgment in its entirety and with respect to both David and

Atlantic (R. 589). Thereafter, with the agreement of Atlantic and without prejudice to its appeal from the judgment in favor of Atlantic, Waterman settled the David case and the appeal was dismissed insofar as he was concerned (not reflected in the record).

The Court of Appeals affirmed the judgment of the District Court (R. 596).

There is no issue of fact material to a consideration to the questions here presented for review. Suffice it to say that in answer to the special interrogatories the Jury found that the SS ARIZPA was unseaworthy (Interrogatory No. 1), that the unseaworthiness was the proximate cause of David's injuries (Interrogatory No. 2), that the unseaworthiness was caused or brought into play by negligence on the part of David's employer, Atlantic, (Interrogatory No. 7); and also that Atlantic did not breach its warranty of workmanlike service, (Interrogatory No. 8), and that the "breach of unseaworthiness" by Waterman was so great as to preclude it from indemnity (Interrogatory No. 10), (R. 551).

REASONS FOR GRANTING THE WRIT

QUESTION I.

WHETHER IN A LONGSHOREMAN'S PERSONAL INJURY SUIT AGAINST A SHIPOWNER, A STEVEDORE CAN NEGLIGENTLY CAUSE OR BRING INTO PLAY AN UNSEAWORTHY CONDITION OF A VESSEL, WITHOUT BREACHING ITS WARRANTY OF WORKMANLIKE SERVICE TO THE SHIPOWNER.

The basic ground upon which the Court of Appeals affirmed the District Court was its legal conclusion that if a vessel's unseaworthiness prevents or hinders the steve-

dore's workmanlike performance, that unseaworthiness is conduct on the part of the shipowner sufficient to preclude indemnity, and to excuse even a negligent breach of warranty by the stevedore.[3] This holding and decision of the Court of Appeals is in direct conflict with the several decisions of this Court and the Courts of Appeal for the Second and Fourth Circuits in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*,[4] *Crumady v. Joachim Hendrik Fisser*,[5] *Drago v. A/S Inger*,[6] *Misurella v. Isthmian Lines, Inc.*,[7] *Mortensen v. A/S Glittre*,[8] *Albanese v. N. V. Nederl Amerik Stoom v. Maats*,[9] and *Calmar Steamship Corp. v. Nacirema Operating Co., Inc.*[10]

In *Ryan Stevedoring Co., Inc. versus Pan Atlantic Steamship Corp.*,[11] this Court first set forth the doctrine that where a stevedoring contractor undertakes to service a vessel, the shipowner is entitled to indemnification for all damages it sustains as a result of the stevedore's breach of its warranty of workmanlike service. Thus, by using a contract formula, relief was given the shipowner which had been denied him when the problem had been looked upon as one of contribution between joint tortfeasors.[12] This Court also made it clear in *Ryan* that although the cause of action for indemnity depended on contractual relations between the parties, either express or implied, the

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[3] Opinion p. 10, 353 F. 2d p. 665.
[4] 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1958).
[5] 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959).
[6] 194 F. Supp. 398, (S.D. N.Y.-1961), aff'd 305 F. 2d 139 (C.A. 2-1962), cert. den. 371 U.S. 925, 83 S. Ct. 292, 9 L. Ed. 2d 232 (1962).
[7] 215 F. Supp. 857 (S.D. N.Y. 1963), aff'd 328 F. 2d 40 (C.A. 2-1964).
[8] 348 F. 2d 383 (C.A. 2-1965).
[9] 346 F. 2d 481 (C.A. 2-1965).
[10] 266 F. 2d 79 (C.A. 4-1959) cert. den. 361 U.S. 816, 80 S. Ct. 56, 4 L. Ed. 2d 62 (1959).
[11] 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956).
[12] Baer, Admiralty Law of the Supreme Court, § 2, (1963) referring to *Halcyon Lines versus Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952).

standard of performance of the stevedore's work is the essential ingredient in determining whether or not the contract has been breached:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." 350 U.S. at pp. 133, 134.

Since *Ryan*, the shipowner-stevedore indemnity doctrine has been before the Courts in innumerable factual situations. In each instance, the Court has reiterated the *Ryan* principle concerning the obligation of the stevedore to perform its contract in a workmanlike manner; and in each instance, the Court has looked to the standard of performance of the stevedore's work in determining whether or not the contract was breached. As was noted in *Ryan*, the shipowner's case for indemnity is not changed from one for breach of contract to one for tort simply because recovery turns on the standard of performance of the stevedore's work. Consequently, in *Ryan* and in all subsequent cases, although the right of action in favor of the shipowner against the stevedore sounded in contract, the crucial issues regarding the standard of performance by

the stevedore necessarily revolved around principles of negligence.[13]

In every case, without exception, when after examining the stevedore's standard of performance the Judge or Jury has found the stevedore guilty of a negligent performance,[14] that negligence has been held to constitute a breach of warranty. See *Waterman Steamship Corporation versus Dugan & McNamara, Inc.;*[15] *Drago v. A/S Inger;*[16] *Koninklyke Nederlandsche Stoomboot Maalschappy N.V. versus Royal Netherlands Steamship Company;*[17] *Griffin v. Scott Paper Company;*[18] *Damanti v. A/S Inger;*[19] *Massa v. C. A. Venezuelan Navigacion;*[20] *Reed v. S/S Yaka;*[21] *Koninklyke, etc. v. Strachan Shipping Co.;*[22] and *Chevis v. Luckenbach Overseas Corp.*[23]

This Court's opinion in *Crumady v. Joachim Hendrik Fisser,*[24] from which counsel for Waterman drafted Interrogatory No. 7,[25] leaves no room for doubt as to the valid-

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[13] Excepting such a factual situation as was presented in *Italia Societa per Azione de Navigazioni versus Oregon Stevedoring Company, Inc.*, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964), where the shipowner was granted indemnity from a non negligent stevedore.

[14] Assuming, of course, that the negligence was causally related to a loss on the part of the shipowner. In this regard, see footnote 46 hereinafter.

[15] 364 U.S. 421, 81 S. Ct. 200, 5 L. Ed. 2d 169 (1960).

[16] *Supra*, footnote 6.

[17] 301 F. 2d 741 (C.A. 5-1962), reh. den. 304 F. 2d 545 (1962), cert. den., 371 U.S. 921, 83 S. Ct. 288, 9 L. Ed. 2d 230 (1962).

[18] 219 F. Supp. 41 (E.D. Pa., 1963).

[19] 314 F. 2d 395, (C.A. 2-1963), cert. den. 375 U.S. 834, 84 S. Ct. 46, 11 L. Ed. 2d 64 (1963).

[20] 332 F. 2d 779 (C.A. 2-1964), cert. den. 379 U.S. 914, 85 S. Ct. 262, 13 L. Ed. 2d 186 (1964).

[21] 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448, (1963), reh. den. 375 U.S. 872, 84 S. Ct. 27, 11 L. Ed. 2d 101 (1963).

[22] 301 F. 2d 741, (C.A. 5-1962), reh. den., 304 F. 2d 545 (1962), cert. den. 371 U.S. 921, 83 S. Ct. 288, 9 L. Ed. 2d 230 (1962).

[23] 228 F. Supp. 642 (E.D. Tex. 1964).

[24] *Supra*, footnote 5.

[25] 7) If the answers to (1) and (2) above are yes, was such unseaworthiness caused or brought into play by any negligence on the part of plaintiff's employer, Atlantic & Gulf Stevedores, Inc., its agents or employees?

(X) Yes ( ) No

ity of this proposition:

> " * * * we need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel." 358 U.S. at p. 427.
>
> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U.S. at p. 429.

The cases cited above stand firmly and without contradiction for the premise that if the negligence of a stevedore proximately causes damage to a shipowner, the stevedore has breached its contract and is in default of its warranty of workmanlike service. It would appear from a close study of the decision of the Court of Appeals that the Court here deferred to the unanimity of jurisprudence and considered Atlantic's negligence as a breach of warranty.[26] Certainly had it not done so it would stand alone, in obvious conflict with the Courts rendering the opinions hereinabove listed.

In view of the jurisprudence, particularly *Crumady v. Joachim Hendrik Fisser*,[27] the Jury's answer to Interrogatory No. 7 that Atlantic was guilty of negligence which caused or brought into play the unseaworthiness of the SS ARIZPA, would entitle Waterman to indemnity unless there is an exception or qualification to the *Crumady*

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[26] "Our task is not to decide whether the SS ARIZPA's unseaworthiness was a sufficient material breach of the shipowner's warranty *to excuse Atlantic's breach of the stevedore's warranty*." Opinion, p. 12, 353 F. 2d p. 666.

It would further appear so since the Court's opinion was not decided on the basic fact of no breach of warranty by Atlantic, but revolved around the issue of conduct sufficient to preclude indemnity from the stevedore which did breach its warranty.

[27] *Supra*, footnote 5.

rule. In the opinion of the Court of Appeals, there is such a qualification.

In the words of the Court of Appeals, this aspect of the instant case turns on the *Weyerhaeuser*[28] corollary to the *Ryan* doctrine:

> "The *Ryan* doctrine enables the shipowner to recover indemnity from the longshoreman's employer, when the unseaworthiness for which the shipowner is liable results from a breach of the stevedoring company's implied warranty of workmanlike service. *Weyerhaeuser* makes explicit a caveat implicit in *Ryan:* To recover indemnity, the shipowner's 'conduct on its part [must not have been] sufficient to preclude recovery.' 355 U.S. at 567." Opinion at p. 2, 353 F. 2d at p. 662.

It was on the basis of this Court's dictum in *Weyerhaeuser* that Atlantic's counsel drafted Interrogatory No. 10,[29] and that the Court of Appeals affirmed the judgment of the District Court in the case at bar. The Court said:

> " * * * The stevedore's negligence is immaterial unless it is a breach of the contractual warranty of workmanlike service and is the proximate cause of the longshoreman's injuries. And under the *Weyerhaeuser* dictum, the stevedore's breach of warranty may be excusable, if the shipowner's conduct is 'sufficient to preclude recovery of indemnity.' " Opinion at p. 7, 353 F. 2d at p. 664.
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> "These contract principles are implicit in the *Weyerhaeuser* dictum. If a vessel's unseaworthi-

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[28] *Supra*, footnote 4.

[29] 10) "If the answer to (7) and (8) is yes, was the breach of unseaworthiness, if any, by Waterman so great as to preclude it from a recovery against Atlantic & Gulf on the Atlantic & Gulf warranty of workmanlike service.
(X) Yes ( ) No"

> ness prevents the stevedore's workmanlike performance, that is 'conduct' on the part of the shipowner 'sufficient to preclude recovery', and to excuse even a negligent breach by the stevedore." Opinion at p. 10, 353 F. 2d at p. 665.

It would appear from this Court's language in *Weyerhaeuser* that certain conduct on the part of the shipowner could preclude it from recovering indemnity from the stevedore. Just what that conduct may be was left unanswered. It was not left unanswered by the Court of Appeals here, and it is that answer with which Petitioner disagrees. The Court of Appeals said that the crucial question was whether or not the shipowner prevents or hinders the stevedore in the performance of its contractual obligation. If a vessel's unseaworthiness (even if caused by the stevedore) does prevent or hinder a workmanlike performance by the stevedore, the Court of Appeals for the Fifth Circuit would consider the unseaworthiness as conduct on the part of the shipowner sufficient to preclude indemnity, and to excuse even a negligent breach of warranty by the stevedore.[30] In holding that unseaworthiness, a species of liability without fault, can constitute conduct on the part of the shipowner sufficient to preclude indemnity from a stevedore whose negligence either caused or brought into play the vessel's unseaworthiness, the Court of Appeals for the Fifth Circuit stands alone and in conflict with the holdings of this Court in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*[31] and *Crumady v. Joachim Hendrik Fisser*,[32] the Second Circuit in *Drago v. A/S Inger*,[33] *Misurella v. Isthmian Lines, Inc.*,[34] *Mortensen v. A/S Glittre*,[35] and *Albanese v. N. V. Nederl*

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[30] Opinion p. 10, 353 F. 2d p. 665.
[31] *Supra*, footnote 4.
[32] *Supra*, footnote 5.
[33] *Supra*, footnote 6.
[34] *Supra*, footnote 7.
[35] *Supra*, footnote 8.

Amerik Stoom v. Maats,[36] and the Fourth Circuit in *Calmar Steamship Corp. v. Nacirema Operating Co., Inc.*[37]

No case since *Weyerhaeuser* has denied a shipowner indemnity from a negligent stevedore on the basis of that elusive "conduct" first mentioned in the *Weyerhaeuser dictum*.[38] Few cases have discussed it; even fewer have attempted to define it; and the majority of those which have discussed it did so through a negative approach, i.e., not by stating what conduct would preclude indemnity, but by eliminating certain conduct as that which would not preclude indemnity.

The *Weyerhaeuser* case itself evidences this approach in holding that the shipowner's failure to inspect and correct an unsafe condition aboard the vessel is not conduct sufficient to preclude indemnity.

In *Crumady* the Court granted indemnity to the shipowner where it furnished defective, and consequently unseaworthy, equipment to the stevedore. Significantly, the shipowner knew of the dangerous condition and the stevedore did not. Certainly, from *Crumady* it can be concluded that by furnishing equipment to the stevedore which it knows to be defective, and consequently unseaworthy, the shipowner is not guilty of "conduct" sufficient to preclude indemnity.

The Fourth Circuit, in the 1960 case of *Calmar Steamship Corp. v. Nacirema Operating Co., Inc.*,[39] followed *Crumady* and was the first case subsequent to *Weyerhaeuser* to meet the "conduct" issue head on. Here a defective light, supplied by the shipowner, was negligently

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[36] *Supra*, footnote 9.
[37] *Supra*, footnote 10.
[38] The instant case excluded.
[39] *Supra*, footnote 10.

handled by stevedores so as to cause injury to the plaintiff longshoreman. After finding the shipowner negligent and the ship unseaworthy, the Court granted the shipowner indemnity from the negligent stevedore. In holding that by supplying the defective light to the stevedores the shipowner was not guilty of conduct sufficient to preclude indemnity, the Court said:

> "Since this decision by the District Court, however, the Supreme Court has adjudicated *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S. Ct. 445, 448, 3 L. Ed. 2d 413. **While this also does not undertake a definitive statement of the conduct on the part of the shipowner which will bar indemnity it indicates that furnishing defective equipment will not necessarily have that effect."** 266 F. 2d at p. 80 (emphasis ours)

With its decisions in *Drago v. A/S Inger*[40] and *Misurella v. Isthmian Lines, Inc.*,[41] the Second Circuit followed the Fourth Circuit's approach.

In *Drago*, a defective winch aboard ship caused injury to the plaintiff longshoreman. With respect to the shipowner's indemnity claim against the stevedore, the Court held that even assuming that the stevedore was a third party beneficiary of the shipowner's express contractual obligation to its time charterer to keep the vessel's gear in good condition, nonetheless the shipowner was entitled to indemnity. In so holding, the Second Circuit said:

> "As we have recently held in *Pettus v. Grace Line, Inc., supra*, **a shipowner's breach of contract in failing to supply adequate equipment to its stevedores is not sufficiently material to excuse the stevedores from the contractual duty to give proper service on which the indemnity claim is here based.**

[40] *Supra*, footnote 6.
[41] *Supra*, footnote 7.

> * * * We find in the record before us no additional circumstances which could possibly constitute 'conduct on (the shipowner's) * * * part sufficient to preclude recovery,' *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S. Ct. 438, 441, 2 L. Ed. 2d 491 (1958), and the appellant has suggested none." 305 F. 2d at p. 143 (emphasis ours)

Thus, in *Drago*, although the Court assumed a specific contractual duty on the part of the shipowner to supply sound equipment to the stevedore, it still refused to deny indemnity on the basis of the *Weyerhaeuser dictum.*

In *Misurella v. Isthmian Lines, Inc.*,[42] the Second Circuit was presented with a case involving gross negligence on the part of a shipowner, together with the unseaworthiness of the vessel. Nonetheless, indemnity in favor of the shipowner against the stevedore was allowed. In *Misurella* the plaintiff-longshoreman was overcome by carbon monoxide fumes while operating a gasoline powered hi-lo in a vessel's hold. The evidence established that the hold was ventilated by a forced air and blower system controlled from a deck house on the vessel's main deck. Despite repeated requests by the longshoremen, the ship's mate did not turn on the ventilation system as he could not find the keys to the deck house. Neither could the longshoremen bring a portable blower into play because the electric current of the ship was not on. In finding the shipowner negligent and the vessel unseaworthy, yet allowing indemnity against the stevedore, the District Court opinion stated:

> "In any event, **here the stevedore urges that the shipowner's conduct was so egregious that it should bear the loss itself.**" 215 F. Supp. at p. 862.
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> " * * * True, the ship on its own was negligent and

[42] *Supra*, footnote 7.

> the vessel was rendered unseaworthy by the non-use of the ventilating equipment, and perhaps a different result would follow if the common law rule applicable to joint tortfeasors prevailed, but it has been made abundantly clear that this concept is inapplicable when breach of a contractual duty is the basis of liability. **Just as a shipowner's breach of contract in failing to supply adequate equipment is not sufficiently material to excuse the stevedore from its contractual duty to render workmanlike service, so here it follows equally that where the shipowner does not supply adequate equipment, the stevedore is not exonerated for its breach in failing to use or cause the use of such equipment."** (emphasis ours)
>
> "The Court is constrained to hold that the circumstances of this case do not constitute 'conduct on its (the shipowner's) part' which relieves the stevedore of its breach of warranty * * * '." 215 F. Supp. at p. 863

The Second Circuit again had the opportunity to face the "conduct" issue in 1965 when it decided the cases of *Mortensen v. A/S Glittre*[43] and *Albanese v. N. V. Nederl Amerik Stoom v. Maats.*[44] These two cases hold that there must be evidence of "active hindrance" by the ship, and that the shipowner must prevent or seriously handicap the stevedore's ability to do a workmanlike job before "conduct" sufficient to preclude indemnity is apparent.

In *Albanese* a longshoreman was injured by monoxide fumes from hi-los used in a vessel's hold. On facts quite similar to *Misurella*, the Court said:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or

[43] *Supra*, footnote 8.
[44] *Supra*, footnote 9.

> seriously handicap the stevedore in his ability to do a workmanlike job. **Merely concurrent fault is not enough.** (cases cited) **There was no evidence of active 'hindrance' by the ship."** 346 F. 2d at p. 484

Likewise, in *Mortensen*, where a longshoreman slipped on oil on a hatch left by a ship's maintenance man, the Second Circuit said:

> "It is true, as the Supreme Court has suggested in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 567, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1958), that there may be conduct on the shipowner's part which may be sufficient to preclude recovery of indemnity. While neither the Supreme Court nor this court has attempted to define with any particularity what constitutes such conduct, *Misurella v. Isthmian Lines, Inc.*, 328 F. 2d 40, 41 (2d Cir. 1964), we have recently concluded that 'it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job.' *Albanese v. N. V. Nederl. Amerik Stoom v. Maats. etc.*, 346 F. 2d 481 (2d Cir. June 15, 1965). **It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over where the contractor's own negligence has brought the unseaworthiness of the vessel into play.** E.g., *Crumady v. J. H. Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959). (emphasis ours)
>
> "Despite every opportunity to do so during the course of the trial, no effort was made to show and **no claim was made that Glittre's conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, let alone that it amounted to 'active hindrance' of the contractor in the performance of its contractual duties, which, as we stand in Albanese, supra, at 484 of 346 F. 2d, is required to defeat the indemnification action."** 348 F. 2d at pp. 384, 385.

In every case cited above, *Weyerhaeuser*, *Crumady*,

Calmar, *Drago*, *Misurella*, *Albanese*, and *Mortensen*, the shipowner delivered an unseaworthy vessel to the stevedore.[45] In each of these cases the facts evidence unseaworthiness on the part of the shipowner which hindered or prevented a workmanlike performance by the stevedore; otherwise the accident would not have occurred. Yet in each case this Court, and the Second, and Fourth Circuits held that unseaworthiness, without more, did not constitute conduct on the part of the shipowner sufficient to preclude indemnity within the meaning of the *Weyerhaeuser dictum*. The Court of Appeals for the Fifth Circuit stands in obvious conflict with these Courts when it holds that solely through delivery to the stevedore of an unseaworthy vessel a shipowner may prevent or hinder the workmanlike performance by the stevedore, and thereby be guilty of conduct sufficient to preclude indemnity from a stevedore whose negligence either caused or brought into play the unseaworthiness giving rise to the accident.[46]

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[45] Although we need not plead the facts herein for a comprehensive presentation of our position, we are compelled to call to the Court's attention that the only fact upon which Waterman could be denied indemnity here is that it may have delivered to Atlantic a defective, and consequently unseaworthy, hatch beam. Negligence was neither pleaded by David, as plaintiff, nor by Atlantic, as cross-complainant, against Waterman, and consequently the issue of negligence was not before the jury.

[46] Although not critical to a granting of the writ, we respectfully suggest that the *Weyerhaeuser dictum* should be re-examined and either properly defined or discarded. We call the Court's attention to Professor Baer's comments in *Admiralty Law of the Supreme Court* at p. 193. He suggests that the "conduct" contemplated relates to the situation where the injury is caused by an unseaworthy condition for which the stevedore is in no way responsible; and if the stevedore is found by the jury to be free from all negligence, then the shipowner against whom the longshoreman recovered would have no action over against the stevedore. Also see *Miller and Company of Birmingham v. Louisville & Nashville Railroad Company*, 328 F. 2d 73 (C.A. 5-1964), cert. den'd, 377 U.S. 966, 84 S. Ct. 1648, 12 L. Ed. 2d 737 (1964), wherein the Court of Appeals quoted the following language from the District Judge's opinion:

> "Absent conduct on its part, as for example, its sole negligence producing the injury to Jackson, (cases cited), which is not the case here presented, plaintiff is entitled to indemnity under paragraph 12 of the contract * * * "

It is certainly logical to assume that if the shipowner is guilty of conduct which would suffice to preclude indemnity, then the stevedore would either not be guilty of negligence at all, or if guilty, then its negligence would have no causal relationship to the accident. The latter was the

Continued

QUESTION II.

WHETHER A SHIPOWNER IS UNDER A DUTY TO USE REASONABLE CARE TO SUPPLY SOUND AND ADEQUATE SHIP'S GEAR TO A STEVEDORE FOR USE BY LONGSHOREMEN ABOARD THE VESSEL; AND IF SO, WHETHER A BREACH OF THAT DUTY WILL PRECLUDE INDEMNITY FROM THE STEVEDORE WHOSE NEGLIGENCE CAUSES OR BRINGS INTO PLAY THE UNSEAWORTHINESS RESULTING FROM THE DEFECTIVE GEAR.

Prompted by a requested charge submitted by Atlantic's counsel, and over objection by Waterman (R. 537, 538, 547, 548, 584, 585), the Trial Judge charged the Jury as follows:

> "Waterman Steamship Corporation was obligated to the Atlantic & Gulf Stevedores, Inc., that it, Waterman, would use reasonable care to supply sound and adequate materials and equipment which it knew the stevedore would use in the performance

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[46] (Continued)
situation in *Reddick v. McAllister Lighterage Line, Inc.*, 2 Cir., 1958, 258 F. 2d 297, cert. den. 358 U.S. 908, 79 S. Ct. 235, 3 L. Ed. 2d 229 (1958), and in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798, reh. den. 369 U.S. 882, 82 S. Ct. 1134, 8 L. Ed. 2d 284, (1962); both erroneously relied upon by the Court in the instant case.

Not here presented to this Court as a separate reason for granting the writ is an issue which is inherent in Question No. 1, and which was strongly urged by Waterman before the Court of Appeals as a reason for reversal of the District Court judgment. That issue is that although the District Judge attempted to present the "conduct sufficient to preclude indemnity" issue to the jury by way of Interrogatory No. 10's reference to "breach of unseaworthiness * * * so great as to preclude it from a recovery," at no time did the Court explain the interrogatory by way of a charge. Considering the difficulty which has been encountered by courts and counsel in handling the "conduct" issue, a jury could hardly be expected to judiciously apply the principle without a proper explanation. We submit that if the Weyerhaeuser dictum regarding conduct is applicable to cases of the sort here presented, the conduct issue should not be given to the jury without adequate explanation.

of customary and usual longshoremen's duties." (R. 537)

The jurisprudence is overwhelmingly against the premises reflected in the charge that: 1) The shipowner owes a duty to the stevedore to supply sound equipment, and 2) That by supplying defective equipment the shipowner is in breach of contract which would preclude indemnity.

In *Pettus v. Grace Line, Inc.*,[47] the Second Circuit affirmed the Trial Judge's refusal to charge the jury in accordance with a charge tendered by the stevedore which was in substance identical to that abovenoted. The requested *Pettus* charge read:

> " * * * if the winches were defective * * * then the shipowner breached its contract to provide adequate winches and cannot recover over against the stevedore * * * ." 305 F. 2d at p. 151

In affirming the District Judge's refusal to give the charge, the Second Circuit said:

> "But the mere fact that Grace Line failed to fulfill its duty to 'supply * * * adequate winches, in good order' did not, without taking the circumstances into consideration, by itself make it guilty of such a material breach."
>
> "The only issue raised by the requested instruction was whether or not the simple fact of supplying defective winches was without more a bar to indemnity, and there can be no question that it was not." 305 F. 2d at p. 154

Similar holdings are reflected in *Crumady*[48] where indemnity was allowed notwithstanding the fact that a defective

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[47] 305 F. 2d 151 (C.A. 2-1962).
[48] *Supra*, footnote 5.

winch was tendered to the stevedore, and in *Calmar*[49] where the Fourth Circuit followed *Crumady* in specifically holding that the supplying of defective equipment to the stevedore would not preclude indemnity. Also see *Drago v. A/S Inger.*[50] In *Simpson v. Royal Rotterdam Lloyd*[51] the Court said:

> "Stevedore contends that it has a valid counterclaim against Shipowner for breach by Shipowner of its implied warranty to Stevedore to furnish Stevedore and its employees with a safe place to work. Apparently, no Court has held that such a cause of action exists, although the possibility that it does has been mentioned." 225 F. Supp. at p. 954

The language used by the District Judge here in the charge complained of advised the Jury in no uncertain terms that the Shipowner owed the Stevedore a duty to supply sound ship's gear, and clearly inferred that a breach of that duty would constitute grounds for a denial of indemnity. In countenancing this charge the Court of Appeals for the Fifth Circuit is unequivocally at odds with the Court of Appeals for the Second Circuit which rejected a basically identical charge in *Pettus.* The conflict between the two Circuits is obvious, and a resolution of the issue in conflict is critical to the maintenance of uniformity between the Circuits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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[49] *Supra*, footnote 10.
[50] *Supra*, footnote 6.
[51] 225 F. Supp. 947 (S.D. N.Y. 1964).

Respectfully submitted,

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JAS. HY. BRUNS,
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Of Counsel.

CERTIFICATE

I hereby certify that copies of the foregoing brief have been served on opposing counsel by placing same in the United States Mail, postage prepaid, addressed to them at their offices.

New Orleans, Louisiana, this _____ day of _____,

JOHN W. SIMS

Service Accepted
All Rights Reserved

CHRISTOPHER THOMPKINS,
Counsel for Atlantic & Gulf Stevedores, Inc.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERROGATORIES AND GENERAL VERDICT SUBMITTED TO THE JURY

INTERROGATORIES TO THE JURY

(Number and Title Omitted) (Filed)

(1) Was the SS ARIZPA unseaworthy?

(x) Yes ( ) No.

(2) If yes, was that unseaworthiness a proximate cause of the plaintiff's injuries?

(x) Yes ( ) No.

(3) If the answers to (1) and (2) are yes, at what amount do you fix the damages sustained by the plaintiff as a result of the accident of which he complains. (The Court will make the computation for contributory negligence, if any, found by you in the following interrogatories).

$84,000.00

(4) Was the plaintiff, Francis David, negligent?

( ) Yes (x) No.

(5) If yes, was that negligence a proximate case of his injuries?

( ) Yes ( ) No.

(6) If the answers to (4) and (5) are yes, to what degree was the plaintiff negligent? (0% to 100%)

_____%

(7) If the answers to (1) and (2) above are yes, was such unseaworthiness caused or brought into play by any negligence on the part of plaintiff's employer, Atlantic & Gulf Stevedores, Inc., its agents or employees?

(x) Yes ( ) No.

(8) Did the agents or employees of the Atlantic & Gulf Stevedores, Inc., breach its warranty to perform its job in a reasonably safe, proper and workmanlike manner?

( ) Yes (x) No.

(9) If the answer to (8) is yes, was such breach a proximate cause of plaintiff's injuries.

( ) Yes ( ) No.

(10) If the answer to (7) and (8) is yes, was the breach of unseaworthiness, if any, by Waterman so great as to preclude it from a recovery against Atlantic & Gulf on the Atlantic & Gulf warranty of workmanlike service.

(x) Yes ( ) No.

CHECK THE APPROPRIATE VERDICTS:

(x) We, the jury find for plaintiff, Francis David, and against the defendant, Waterman Steamship Company, as indicated above.

( ) We, the jury, find for defendant, Waterman Steamship Company, and against plaintiff, Francis David, as indicated above.

( ) We, the jury find for third-party plaintiff, Waterman Steamship Company, and against third-party defendant, Atlantic & Gulf Stevedores, Inc., as indicated above.

(x) We, the jury, find for third-party defendant, Atlantic & Gulf Stevedores, Inc., and against third-party plaintiff, Waterman Steamship Company, as indicated above.

S/ D. R. Hanemann
FOREMAN

March 18, 1964
New Orleans, La.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JUDGMENT

(Number and Title Omitted) (Filed March 23, 1964)

In accordance with the direction of the Court that judgment be entered herein upon the jury's special verdict, rendered herein on March 18, 1964, containing answers to questions;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Francis David and against Waterman Steamship Corporation in the amount of Eighty-four Thousand ($84,000.00) Dollars, with interest from date of judicial demand and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third-party defendant, Atlantic & Gulf Stevedores, Inc., and against third-party plaintiff, Waterman Steamship Corporation, dismissing third-party plaintiff's complaint.

Dated at New Orleans, Louisiana, this 23 day of March, 1964.

S/ A. Dallam O'Brien, Jr.,
A. DALLAM O'BRIEN, JR.,
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ORDER DENYING MOTIONS FOR NEW TRIAL AND GRANTING MOTION OF DEFENDANT FOR AMENDMENT OF JUDGMENT TO ELIMINATE THE AWARD OF INTEREST

APRIL 24, 1964

MINUTE ENTRY ELLIS, FRANK B.—JUDGE

(Number and Title Omitted)

This cause came on for hearing on a former day on motion of defendant, Waterman Steamship Corporation to enter judgment in its favor and against the plaintiff, Francis David, notwithstanding the verdict, and alternatively for a new trial with respect to the claims of the plaintiff, Francis David; and further in the alternative for a judgment against third-party defendant, Atlantic & Gulf Stevedores, Inc., notwithstanding the general verdict and consistent with the answer to Special Interrogatory No. 7, alternatively for a new trial as against third-party defendant, Atlantic & Gulf Stevedores, Inc., on the question of the effect, if any, of defendant, Waterman's conduct on its right of indemnity and further alternatively for a new trial on all issues between mover and third-party defendant, and further in the alternative for an amendment of the judgment to eliminate the award of interest from the date of judicial demand.

After having heard argument of counsel and studied the briefs submitted the Court is now ready to rule.

IT IS ORDERED that the motion of defendant, Waterman Steamship Corporation, to enter judgment in its favor and against the plaintiff, Francis David, notwithstanding the verdict, and alternatively for a new trial with respect to the claims of the plaintiff, Francis David, be, and the same is hereby DENIED: and

IT IS FURTHER ORDERED that the motion of defendant, Waterman Steamship Corporation, for a judgment against third-party defendant, Atlantic & Gulf Stevedores, Inc., notwithstanding the general verdict and consistent with the answer to special interrogatory No. 7, and alternatively for a new trial as against third-party defendant, Atlantic and Gulf Stevedores, Inc., on the question of the effect, if any, of defendant, Waterman Steamship Corporation's conduct on its right of indemnity, be, and the same is hereby DENIED: and

IT IS STILL FURTHER ORDERED that the motion of defendant, Waterman Steamship Corporation for a new trial on all issues between it and third-party defendant, Atlantic & Gulf Stevedores, Inc., be and the same is hereby DENIED: and

IT IS STILL FURTHER ORDERED that the motion of defendant, Waterman Steamship Corporation, for an amendment of the judgment to eliminate the award of interest from the date of judicial demand be, and the same is hereby GRANTED: and

IT IS STILL FURTHER ORDERED that the judgment entered and filed herein on March 23, 1964, be and the same is hereby MODIFIED, so as to render judgment for the amount of the verdict only.

REASONS

While it may be true that the jury's answer to special interrogatory number 7 is inconsistent with the jury's

general verdict, it may not be considered inconsistent when considered in the light of all the interrogatories, and thus the case must be resolved that way. "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. (A) search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364.

The matter of the award of interest may also be disposed of perfunctorily. Interest before a decree runs upon an award under the maritime law only when allowed in the discretion of the court. In a maritime matter tried by jury on the civil side of the court "it is the federal law that an award of interest rests in the discretion of the jury and it is the jury who must exercise it," Hand, J. in *Newburgh Land & Dock Company v. Texas Company*, 2 Cir. 277 F. 2d 732.

Thus the judgment must be modified by striking out the award of interest and judgment should be entered for the amount of the verdict only.

F.B.E.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21830

WATERMAN STEAMSHIP CORPORATION,
Appellant,

versus

FRANCIS DAVID, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(November 11, 1965.)

Before JONES and WISDOM, Circuit Judges, and BREWSTER, District Judge.

WISDOM, Circuit Judge: This appeal turns on the *Weyerhaeuser* corollary to the *Ryan* doctrine of stevedore-shipowner indemnity.[1] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; *Weyerhaeuser Steamship*

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[1] For a discussion of the Ryan doctrine see Baer, Admiralty Law of the Supreme Court Sec. 2-9 (1963). Vickery, Stevedore-Shipowner Indemnity: The Ryan Doctrine, in Tidelands and Mineral Law, 7th Ann. Tul. Tidelands Institute at 167, 168 (1963); Stover, Longshoremen-Shipowner-Stevedore; The Circle of Liability, 61 Mich. L. Rev. 539 (1963); White, A New Look at the Shipowner's Right-Over for Shipboard Injuries, 12 Stan. L. Rev. 717 (1960); Lucas, Flood Tide: Some Irrelevant History of the Admiralty, in the Supreme Court Review 249 (1964); Comment, 37 Tul. L. Rev. 786 (1963); Note, 62 Mich. L. Rev. 1446 (1964); Note, 24 La. L. Rev. 876 (1964).

Company v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491. Under the *Sieracki* line of decisions, a shipowner is liable to an employee of a stevedoring or ship-refitting company for an injury caused by negligence of the shipowner or unseaworthiness of the vessel on which the injured longshoreman or other employee is working.[2] The *Ryan* doctrine enables the shipowner to recover indemnity from the longshoreman's employer, when the unseaworthiness for which the shipowner is liable results from a breach of the stevedoring company's implied warranty of workmanlike service. *Weyerhaeuser* makes explicit a caveat implicit in *Ryan:* To recover indemnity, the shipowner's "conduct on its part [must not have been] sufficient to preclude recovery". 355 U.S. at 567. The Supreme Court did not declare just what conduct is sufficient to bar indemnification, although the Court did declare that "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." Id. at 569. In the case before us the question was properly put to the jury. The jury decided that unseaworthiness was the proximate cause of the plaintiff's injuries and that the shipowner's conduct was "so great as to preclude recovery of indemnity." We affirm the judgment based on the jury's verdicts.

I.

Francis David, a longshoreman employed by Atlantic & Gulf Stevedores, Inc., was injured while working aboard Waterman's S. S. Arizpa in New Orleans. David was one of a gang of longshoremen opening and clearing a between-decks cargo hatch. On Waterman vessels, the hatch covers

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[2] Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; Mahnich v. Southern S.S. Co. 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561; Mitchell v. Trawler Racer, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941; Alaska S. S. Co. v. Petterson, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 2d 798.

rest on a series of I-beams. The beams lie from port to starboard. At each end of the I-beam there is a wheel which runs along a metal track. A jack bar inserted into a cam engages and disengages the wheel. The end of the beam also rests on an upper guide rail as an additional safety precaution. To clear the hatch for loading or unloading cargo, the longshoremen first remove the hatch covers, then one man on each end engages the wheel by inserting the jack bar and rotating the cam. The other members of the gang, half on each end of the beam, roll the beam down to the end of the hatch by pulling with ropes or a metal pull bar inserted into a metal eye on each end of the beam. After they have rolled all of the I-beams down to the end of the hatch, the hatch is clear for loading or unloading.

On the morning of the accident, David's gang had already cleared the weather-deck cargo hatch without any difficulty. They then removed the hatch covers from the between-decks hatch and moved two of the I-beams to the end of the hatch without incident. David was operating the jack bar on the onshore end of the beams. As they were moving the third beam, the beam jumped the track at the offshore end and fell into the hold. The falling beam struck David and catapulted him into the hold. He was seriously injured.

David sued Waterman, the shipowner, alleging that his injuries were sustained as a result of unseaworthiness, "specifically, in that the track for the roller on said beam was not safely designed and the roller, which left the track, was worn and not fit for the use intended * * * ." In its answer, Waterman denied that the accident occurred in the manner alleged, denied the alleged unseaworthiness of the S. S. Arizpa and, as a special, alternative defense, pleaded contributory negligence on the part of David.

Waterman filed a third party complaint against Atlantic & Gulf Stevedores for indemnification based on the contention that Atlantic breached its warranty of due care. Waterman alleged that Atlantic was aboard the S. S. Arizpa in connection with performance of general stevedoring work and was in full custody and control of the areas where David allegedly sustained injury, that it was the duty of Atlantic to perform its work with due diligence and safety, and that any injuries sustained were caused by the negligence and fault of Atlantic. The jury returned a general verdict for David against Waterman in the amount of $84,000.[3] The jury returned a second general verdict denying Waterman's claim against Atlantic stevedores. The court rendered judgment in accordance with the verdicts.

II.

Waterman's argument on appeal rests chiefly on the contention that the jury's answers to certain interrogatories required a judgment in its favor and, at the very least, were inconsistent with answers to other interrogatories.[4]

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[3] Waterman also appealed the general verdict in favor of David. This appeal has been settled and dismissed with the consent of all parties.

[4] The following interrogatories were submitted to the jury:

1) Was the S. S. Arizpa unseaworthy?
(X) Yes ( ) No

2) If yes, was that unseaworthiness a proximate cause of the plaintiff's injuries?
(X) Yes ( ) No

3) If the answers to (1) and (2) are yes, at what amount do you fix the damages sustained by the plaintiff as a result of the accident of which he complains. (This Court will make the computation for contributory negligence, if any, found by you in the following interrogatories).
$84,000

4) Was the plaintiff, Francis David, negligent?
( ) Yes (X) No

5) If yes, was that negligence a proximate cause of his injuries?
( ) Yes ( ) No

6) If the answers to (4) and (5) are yes, to what degree was the plaintiff negligent? (0% to 100%)
_____%

7) If the answers to (1) and (2) above are yes, was such un-

Continued

In answer to the first two interrogatories, the jury found that the proximate cause of the accident was the unseaworthiness of the beam roller assembly. In answer to the seventh interrogatory, the jury found that Atlantic was negligent, and that the negligence "caused or brought into play" the vessel's unseaworthiness. Waterman assumes that these findings necessarily required a verdict in its favor, relying on the *Ryan and Crumady v. Joachim Hendrik Fisser*, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 holdings that a shipowner cast for unseaworthiness may recover over against the employer of the injured seaman if the employer's negligence amounts to a breach of warranty of workmanlike performance. But the jury also found, replying to the eighth interrogatory, that the negligence did not constitute a breach of Atlantic's warranty to perform its job in a reasonably safe and work-

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[4] (Continued)

seaworthiness caused or brought into play by any negligence on the part of plaintiff's employer, Atlantic & Gulf Stevedores, Inc., its agents or employees?

(X) Yes ( ) No

8) Did the agents or employees of the Atlantic & Gulf Stevedores, Inc. breach its warranty to perform its job in a reasonably safe, proper and workmanlike manner?

( ) Yes (X) No

9) If the answer to (8) is yes, was such breach a proximate cause of plaintiff's injuries?

(X) Yes ( ) No

10) If the answer to (7) and (8) is yes, was the breach of unseaworthiness, if any, by Waterman so great as to preclude it from a recovery against Atlantic & Gulf on the Atlantic & Gulf warranty of workmanlike service?

(X) Yes ( ) No

CHECK THE APPROPRIATE VERDICTS:

(X) We, the jury find for plaintiff, Francis David, and against the defendant, Waterman Steamship Company, as indicated above.

( ) We, the jury, find for defendant, Waterman Steamship Company, and against plaintiff, Francis David, as indicated above.

( ) We, the jury, find for third-party plaintiff, Waterman Steamship Company, and against third-party defendant, Atlantic & Gulf Stevedores, Inc., as indicated above.

( ) We, the jury, find for third-party defendant, Atlantic & Gulf Stevedores, Inc., and against third-party plaintiff, Waterman Steamship Company, as indicated above.

manlike manner. The jury's answer to the tenth interrogatory is consistent with its answer to the eighth interrogatory: The unseaworthiness of the vessel was "so great as to preclude" Waterman's recovery from Atlantic for breach of warranty.

It is the "duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them", and "to reconcile the jury's findings by exegesis if necessary * * * before we are free to disregard the jury's special verdict and remand the case for a new trial". *Gallick v. Baltimore & Ohio R. Co.*, 1963, 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618. If "there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which makes the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores v. Ellerman Line*, 1962, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798.

III.

The result the jury reached agrees with the Supreme Court's treatment of the stevedore's indemnity obligation as resting on contract, not tort principles.[5] The stevedore's negligence is immaterial unless it is a breach of the contractual warranty of workmanlike service and is the prox-

[5] The Supreme Court has "crossed the bridge" of contractual privity and entered "the zone of modern law that recognizes rights in third-party beneficiaries." Crumady v. Joachim Hendrik Fisser, 358 U.S. at 428. The vessel is the third party beneficiary.

The stevedore's liability, however, may rest on tort as well as on contract. Even if there is no contract between the stevedoring company and the shipowner, the stevedore still has an independent duty to exercise due care in performing his work aboard the ship. There is much to be said for a tort approach. Baer, Admiralty Law of the Supreme Court, § 2-9 at 197-198. In tort the courts could apply the traditional maritime law technique of comparative fault as between shipowner and stevedoring company. See American Stevedores, Inc. v. Porello, 1947, 330 U.S. 446; Gilmore & Black, Admiralty sec. 6-56 at 366-367. But see Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 1952, 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 in which the Court referred to Congress the possibility of applying comparative fault in the shipowner's suit for indemnity.

imate cause of the longshoreman's injuries. And under the *Weyerhaeuser* dictum, the stevedore's breach of warranty may be excusable, if the shipowner's conduct is "sufficient to preclude recovery of indemnity".

The stevedore's "warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." *Ryan*, 350 U.S. at 133. In a more recent case the Supreme Court, declining to take a bailment approach,[6] again noted that the considerations underlying the stevedore's warranty are the same as those which "underlie a manufacturer's or seller's obligation to supply free of defects." *Italia Societa v. Oregon Stevedoring Company*, 1964, 376 U.S. 315, 318, 74 S. Ct. 748, 11 L. Ed. 2d 732 *(Griffith's case)*. See also *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448. In *Griffith's case*, allowing indemnity, the Supreme Court held that "the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based on the stevedore's implied warranty of workmanlike service." The Court said: "Although in *Ryan* the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and non-negligent action . . . . . [L]iability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury." 376 U.S. at 318.

In *Weyerhaeuser* the breach of contract was the stevedore's negligence. The Supreme Court said: "If * * *

[6] See Booth SS. Co. v. Meier & Oelhaf Co., 2 Cir. 1958, 262 F. 2d 310.

respondent (stevedoring company) rendered a substandard performance which led to foreseeable liability of petitioner (the owner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (emphasis added) 355 U.S. at 567. The Court left no doubt that the law of contract determines what is "conduct sufficient to preclude recovery." The Court cited sections 295 and 315 of the Restatement of Contracts (First). Section 295 provides that: "If a promisor prevents or hinders * * * the performance of a return promise, and the * * * return promise (would have) been rendered except for such prevention or hindrance * * * the actual or threatened nonperformance of the return promise does not discharge the promisor's duty * * * " Section 315, entitled "Breach by Preventing or Hindering Performance by Other Party"; reads:

> "(1) Prevention or hindrance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract * * * "
>
> "(2) Acts that would have been sufficient to hinder or prevent the occurrence of a condition or the performance of a return promise are not a breach of contract if the condition would not have occurred or the return promise have been performed had those acts not been done."

The Court cited sections 571, 947, and 1264 of Corbin on Contracts dealing with excuse of a breach of contract through acts of the other party which hinder or prevent performance of the contract.

These contract principles are implicit in the *Weyer-*

haeuser dictum.[7] If a vessel's unseaworthiness prevents the stevedore's workmanlike performance, that is "conduct" on the part of the shipowner "sufficient to preclude recovery", and to excuse even a negligent breach by the stevedore. In *Reddick v. McAllister Line, Inc.*, 2 Cir. 1958, 258 F. 2d 297, cert. denied 358 U.S. 908, for example, the court reversed, as clearly erroneous, a finding that the stevedore's fault required a judgment of indemnity in the shipowner's favor. The Second Circuit said: "However, even if it was properly found that Clark (stevedore) by improper stowage breached its implied warranty of workmanlike service to McAllister (shipowner), a majority of the court thinks that there is no showing that this breach caused Reddick's injury. Under the general test of foreseeability applied to contractual liability, a breach must have been the cause of the injury. We think that in this

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[7] In a recent comment the author suggests: "The obligations owed by the shipowner" are:

1) To exercise ordinary care in placing the ship and its appliances in such a condition that an experienced stevedore, aware of the normal dangers expected to arise in the ship's service, may, by the exercise of reasonable care, discharge his obligations in a workmanlike manner with reasonable safety to persons and property;

2) To provide reasonable warning of any hidden or latent dangers not usually or reasonably expected by an experienced stevedore, provided that the shipowner know of, or, with reasonable care under the circumstances, should have known of the danger and that it was danger such as the stevedore would normally encounter in the performance of his services; and

3) To refrain from materially burdening, delaying, or interfering with the performance of the stevedoring operator in an unreasonable manner.

The use of a breach of any of these obligations as a measure of conduct sufficient to preclude recovery has gained favor in subsequent holdings, does not appear to conflict with any existing determination by the Supreme Court, and could provide reasonable content to the *Weyerhaeuser* principle.

It may be noted that a latent defect causing injury may interfere with indemnification in two ways. If the defect is within the knowledge of the shipowner and no warning is given, the shipowner may not be allowed to recover. However, the latent nature of a defect not within the knowledge of the shipowner will preclude the foreseeability requirement necessary to the liability of stevedores." Comment, The Ryan Doctrine: Present Stature and Future Development, 37 Tul. L. Rev. 786, 801 (1963).

case the latent defect in the board on the top of the crate was the intervening cause which broke any causal chain that might otherwise have existed." 258 F. 2d at Similarly, the stevedore's warranty of workmanlike service does not put him under the duty to discover defects in equipment furnished him by the shipowner, such as a rotten rope. *Ignatyuk v. Tramp Chartering Co.*, 2 Cir. 1957, 250 F. 2d, 198.

In these cases and in the instant case, the factfinder's evaluation of the shipowner's conduct involves a weighing process. Thus, in *Hagans v. Farrell Lines*, 3 Cir. 1956, 237 F. 2d, 477, it was contended that an interrogatory concerning the stevedore's asserted negligence was answered in a way that was inconsistent with the general verdict. In answer, the Court said: "We think it is a necessary conclusion from the question addressed to the court by the jury, and the general verdict (against the shipowner and in favor of the stevedore), that the jury must also have concluded that the defective winch was a substantial cause of the accident, and that the negligence of Lavin's (the stevedore's) employees was not a substantial cause of the accident."

Our task is not to decide whether the S. S. ARIZPA'S unseaworthiness was a sufficiently material breach of the shipowner's warranty to excuse Atlantic's breach of the stevedore's warranty. That is the jury's task. So, in *Weyerhaeuser* the Supreme Court observed:

> "The evidence bearing on these issues—petitioner's (owner's) action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's (stevedore's) continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions." 355 U.S. at 567.

And see *McNamara v. Weichsel Damp. A. G. Kiel*, 2 Cir. 1961, 293 F. 2d 900, 904; *Moore-McCormick Lines, Inc. v. Mayland Ship Ceiling Co.*, 4 Cir. 1962, 311 F. 2d 663.

Here the jury concluded that in spite of Atlantic's negligence, the defective roller beam assembly was the proximate cause of the accident and amounted to conduct on the part of the shipowner sufficient to preclude indemnification. We cannot say that the jury was confused or inconsistent or that the record fails to support the jury's finding.[8]

The judgment is AFFIRMED.

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[8] Waterman alleges several other errors. Waterman attacks the admission of evidence that the upper guide rail was defective, because the evidence was based on an inspection several years after the accident. This error was not prejudicial, since there was substantial other evidence before the jury to support a verdict of unseaworthiness. At any rate the admission of this type of evidence was within the sound discretion of the trial judge. See McCormick, Evidence sec. 167 at 350; 2 Wigmore, Evidence (3rd ed.) sec. 437 at 414. Admiralty practice tends to admit evidence excludible in common law courts. American Cyanamid Co. v. China Union Lines, Ltd., 5 Cir. 1962, 306 F. 2d 185. Thus, this Circuit recognizes the rule that subsequent events may accurately reflect earlier conditions. Avera v. Florida Towing Corp., 5 Cir. 1963, 322 F. 2d 155, 162 & n. 12. A lapse of several years does stretch the rule, but not beyond the breaking point when the rule is applied to a durable object such as an upper guide rail.

Waterman also complains that the second special interrogatory was erroneous because it implied that an unseaworthiness of the vessel was a breach of contract and prevented recovery by Waterman. The jury's answer to the tenth interrogatory disposes of this contention.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1964

NO. 21,830

D. C. Docket No. 10667—Civil Action

WATERMAN STEAMSHIP CORPORATION,
Appellant,

versus

FRANCIS DAVIS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and WISDOM, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel; ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Waterman Steamship Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 11, 1965

Issued as Mandate:

APPENDIX F

U. S. Court of Appeals
Filed Feb 1st 1966
Edward W. Wadsworth, Clerk

[543]—Wisdom

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21,830

WATERMAN STEAMSHIP CORPORATION,
Appellant,

vs.

FRANCIS DAVID, ET AL,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(February 1, 1966)

ON PETITION FOR REHEARING

Before JONES and WISDOM, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby DENIED.

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FILED
MAY 25 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

ATLANTIC & GULF STEVEDORES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Eberhard P. Deutsch
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Attorney for Respondent

Deutsch, Kerrigan & Stiles
Christopher Tompkins
Of Counsel

This Court is being asked to grant certiorari to review the action of the Court of Appeals in affirming a judgment entered on a jury verdict against petitioner and in favor of respondent.

Although petitioner asserts that important inter-circuit conflicts of law are involved, it is obvious from the opinion of the Court of Appeals that it is not in conflict with that of any other circuit; and that petitioner's real quarrel is with the jury's findings of fact which were accepted by the Court of Appeals.

The issue of liability in David's case against petitioner was whether or not the ship was unseaworthy by virtue of a defective hatch beam assembly. The jury found that the ship was unseaworthy, and that such unseaworthiness was a proximate cause of the plaintiff's injuries. The jury then found expressly that although the unseaworthiness was brought into play by negligence of respondent's agents or employees, such negligence did not constitute a breach of respondent's contractual warranty to perform its work in a reasonably safe, proper and workmanlike manner.

The jury went further, in answer to one of the special interrogatories directed to it, and found that the unseaworthiness of the ship was "so great as to preclude (petitioner) from recovery against (respondent) on the (latter's) warranty of workmanlike service". The jury then expressly entered two findings on a general verdict form: (1) For David and against petitioner and (2) against petitioner and for respondent.

Since the decision below does not conflict on any point with applicable holdings of this Court or of other Courts of Appeal, and the only questions at issue are questions of fact decided by the jury, it is respectfully submitted that certiorari should be denied.

Eberhard P. Deutsch
Attorney for Respondent

Deutsch, Kerrigan & Stiles
Christopher Tompkins
Of Counsel

May, 1966